

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

<b>ALICE ACHEE-SHARP,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>CIVIL ACTION</b>
	)	
<b>v.</b>	)	<b>No. 19-2100-KHV</b>
	)	
<b>LENEXA REAL ESTATE PORTFOLIO</b>	)	
<b>PARTNERS, LLC, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	
	)	

**MEMORANDUM AND ORDER**

This matter is before the Court on the Motion Of Defendant/Third-Party Plaintiff Lenexa Real Estate Portfolio Partners, LLC To Quash Plaintiff's Subpoena To Hammons Asphalt Paving, Inc. Or In The Alternative Motion For Protective Order (Doc. #224) filed October 5, 2020. Under D. Kan. Rule 6.1(d)(1), plaintiff had until October 19, 2020 to file a response to defendant's motion. To date, plaintiff has not responded and defendant's motion is therefore unopposed. A party who fails to file a responsive brief or memorandum within the time specified waives the right to later do so, and the Court will consider and decide the motion as uncontested. D. Kan. Rule 7.4(b). Ordinarily, the Court will grant the motion without further notice. Id. For this reason and for substantially the reasons stated below, the Court sustains defendant's motion.

Discovery closed on August 14, 2020. Amended Scheduling Order (Doc. #119) filed April 1, 2020, at 2. On the parties' joint motion, the Court extended discovery for certain depositions and a Rule 35 examination of plaintiff. See Order (Doc. #188). On September 8, 2020, plaintiff filed a notice that she intended to issue a subpoena duces tecum to Hammons Asphalt Paving, Inc. ("Hammons"). See Notice Of Intent To Issue Subpoena (Doc. #193). On September 22, 2020, defendant filed an objection to the subpoena. Objections To Plaintiff's Notice

Of Intent To Issue Subpoena To Hammons Asphalt Paving, Inc. (Doc. #209). On October 5, 2020, after the parties failed to reach agreement, defendant filed the instant motion to quash the subpoena or for the Court to issue a protective order.

Plaintiff did not seek leave of Court or obtain the agreement of the parties to issue the subpoena to Hammons beyond the deadline in the amended scheduling order. Accordingly, defendant is entitled to relief on its motion. See Scherer v. GE Capital Corp., 185 F.R.D. 351, 352 (D. Kan. 1999) (absent extension of discovery deadline, party generally may not proceed with discovery over objection of opposing party). As of the filing of defendant's motion, however, plaintiff had not informed defendant whether she had issued the subpoena. If plaintiff has already issued the subpoena to Hammons, the Court quashes it under Rule 45 of the Federal Rules of Civil Procedure. If plaintiff has not issued the subpoena to Hammons, the Court directs that plaintiff not do so.

Defendant also seeks its costs in bringing its motion related to the subpoena. Defense counsel conferred with plaintiff's counsel before filing the motion related to the subpoena. Plaintiff has offered no justification for attempting to issue the subpoena without leave of Court or agreement of the parties. Accordingly, it appears that an award of attorney fees and expenses is appropriate under Rule 37(a)(5). See Fed. R. Civ. P. 26(c)(3) (Rule 37(a)(5) applies to award of expenses on motion for protective order); Fed. R. Civ. P. 37(a)(5)(A) (unless opposing party's response was substantially justified or award of expenses unjust, court must require party whose conduct necessitated motion to pay movant reasonable expenses incurred in making motion, including attorney fees). Defendant shall promptly initiate consultation with plaintiff on the amount of attorney fees and expenses. If the parties reach an agreement, they shall file a stipulation by November 20, 2020. If the parties are unable to agree, defendant shall file a motion that

includes a statement of (1) its efforts to reach an agreement with regard to the fee award and (2) the factual basis for the fee award.

**IT IS THEREFORE ORDERED** that the Motion Of Defendant/Third-Party Plaintiff Lenexa Real Estate Portfolio Partners, LLC To Quash Plaintiff's Subpoena To Hammons Asphalt Paving, Inc. Or In The Alternative Motion For Protective Order (Doc. #224) filed October 5, 2020 is **SUSTAINED**. If plaintiff has already issued the subpoena to Hammons Asphalt Paving, Inc., the Court quashes the subpoena under Rule 45, Fed. R. Civ. P. If plaintiff has not issued the subpoena to Hammons Asphalt Paving, Inc., the Court directs that plaintiff not do so.

**IT IS FURTHER ORDERED** that defendant Lenexa Real Estate Portfolio Partners, LLC is entitled to an award of fees and expenses. Defendant shall promptly initiate consultation with plaintiff on the amount of attorney fees and expenses that it incurred in filing the Motion Of Defendant/Third-Party Plaintiff Lenexa Real Estate Portfolio Partners, LLC To Quash Plaintiff's Subpoena To Hammons Asphalt Paving, Inc. Or In The Alternative Motion For Protective Order (Doc. #224). If the parties reach an agreement, they shall file a stipulation by November 20, 2020. If the parties are unable to agree, defendant shall file by November 20, 2020 a motion that includes a statement of (1) its efforts to reach an agreement with regard to the fee award and (2) the factual basis for the fee award.

Dated this 30th day of October, 2020 at Kansas City, Kansas.

s/ Kathryn H. Vratil  
KATHRYN H. VRATIL  
United States District Judge